No. 3531

In the

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

Wm. H. Moore, Jr., as Trustee in Bankruptcy of the Estate of Kirkbald & Webb, a Partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr., *and* Rex Webb, as Individuals, Bankrupts,

*Appellant,*

vs.

T. E. Risley,

*Appellee.*

## BRIEF ON BEHALF OF APPELLEE

FRANK KAUKE,
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*Appellant,*

vs.

T. E. RISLEY,

*Appellee.*

## BRIEF ON BEHALF OF APPELLEE

The facts of this case are set forth in the Transcript of Record (pp. 7-16), but we submit that the statement in appellant's brief of the issues involved is misleading, and, in part incorrect.

## REPLY TO APPELLANT'S FIRST CONTENTION

Originally three persons, Webb, Kimball and Koll, were named as lessees in the written lease, but before any merchandise was moved into the building and business opened, Koll severed his connections with Kimball and Webb, and in writing assigned to them his interest in the lease. At the same time, and in consideration of the transfer, Kimball and Webb in writing agreed to be bound by and comply with all the terms and conditions of the lease, and the lessor (appellee herein), in consideration of said promise and agreement consented to the assignment.

This was not a case of a mere naked assignment of the lease, but was one whereby from that time forward Kimball and Webb held under the lease the same as though they, and they alone, had been the original lessees named in the lease.

The matter of the distinction between an assignment such as made here and a mere naked assignment is fully and clearly discussed in Chase v. Oehlke, 43 Cal. App. R. 435; 185 Pac. 425.

See also Lopizich v. Salter, 31 Cal. App. Dec. 161; 187 Pac. 1075, to the same effect, and wherein a statement made as to counsel for respondent there is quite applicable to counsel for appellant here. "The error of counsel for respondent is due to the fact that he assumes the action to be based upon privity of estate alone arising from the relation of

landlord and tenant rather than upon express covenants."

This is not a case where one of the original lessees (not a bankrupt) is in possession under the lease while another one or more has been adjudicated a bankrupt. Were it so there would be presented a case similar to that where one lessee assigns to another, or assigns to a third party, leaving his co-lessee as one of the parties in possession, and leaving the landlord with the tenant of his own choosing. In the instant case Koll could not, either as against the appellee, nor as against Kimball & Webb, resume or take over the possession of the premises under the lease. For value received he assigned all his interest in the lease, and in consideration thereof, Kimball and Webb agreed to be bound by all the terms and conditions of the lease, and in consideration of the promise on their part, the appellee consented to the assignment. It is therefore evident that it was the intention of all of the parties that thenceforth as to all the terms and conditions of the lease Kimball & Webb, and they alone, were the "lessees" of the lease, for all purposes.

In the matter of Lindy-Friedman Clothing Co., Inc., Bankrupt, 275 Fed. Rep. 453 the District Court of the Northern District of Alabama, Southern Division, had occasion to review an order of the referee relative to a lease wherein there was a clause similar to that contained in the lease in question in the case

at bar. In that case the referee's decision was in favor of the trustee, and the order was to the effect that the trustee was entitled to the possession of the premises and the ownership of the leasehold, and the lessors were enjoined from interfering with the possession of the trustee and his assigns.

The lease contained the following paragraph:

> "The lessee agrees * * * not to assign this lease, nor underlease or let said premises, or any part or interest therein, without the written consent of the lessor, hereon indorsed * * If an execution or other process be levied upon the interest of the lessee in this lease, or if a petition in bankruptcy be filed by or against the lessee in any Court of competent jurisdiction, the lessor shall have the right, at his option, to re-enter said premises and annul this lease."

It also contained the following:

> "It is contemplated by the lessees herein to organize a corporation with not less than $20,000.00 paid-up capital, and it is agreed that when said corporation is organized the lessees shall have the right to transfer, assign this lease and sublet the property described to such corporation. The form to be used in the transfer and subletting shall be the same as the form hereto attached marked 'Exhibit A'."

Exhibit A was as follows:

> "For value received the lease contract hereto

attached, by and between ..... as lessor, and ..... as lessee, is hereby transferred, assigned and conveyed by ..... to ..... and the property described in said lease contract is hereby sublet by ..... to ....., and in consideration thereof the said ..... hereby agrees to pay the rent due or to become due under the terms of said contract to ....., and further assumes all other obligations of the original lessee to the original lessor.

"The undersigned ..... hereby consents to the above transfer, assignment and subletting, but in giving his consent does not in any wise change or modify said contract or release the original lessee from any obligation to the original lessor."

The District Court said:

"Throughout the lease the landlords are called 'lessors,' while the tenants are called 'lessees'. Friedman and Lindy occupied the premises for a brief period, and then, as contemplated by the provision quoted from the lease, organized the corporation, which entered and occupied the premises for the period from about September, 1919, to June, 1920, and then became bankrupt, and its estate is now being administered by this Court. John S. Coxe was appointed receiver, and subsequently, in the latter part of June, 1920, made trustee of the estate.

"On June 30, and July 5, 1920, the lessors, S. L. Tyson and N. W. Tyson, gave notice in

writing to the original lessees, the subtenants, the bankrupt and the trustee, that they elected to exercise their option to re-enter the said premises, and made demand for the surrender thereof, assigning no particular reason. On May 18, 1921, the trustee in bankruptcy filed his petition, setting out substantially the foregoing facts, and praying for an order to the effect that the trustee is entitled to possession and ownership of the leased premises, and to have the lease performed by the lessors in favor of the trustee for its unexpired term. Upon the hearing of this petition, the facts were substantially without dispute.

"Undoubtedly, the landlords had fundamental rights, which if not granted away by them, cannot now be taken from them by a Court; and it is clear to my mind that the intention was to preserve and not to surrender certain of these rights.

"It is a sound proposition and applicable to this lease that, it being for a term of years, restrictions against assignments without the consent of the lessor are valid, for various reasons, among them that a lessor has the right to exercise his judgment with respect to the persons to whom he trusts the management or custody of his premises. Naturally he does not want undesirable tenants, those who may use his property for unlawful purposes, or those whom he may consider financially irresponsible. This doctrine, I think, is upheld by the cases cited in 16 R. C. L. Sec. 326-645."

"The lessors urge that the lease contract has been terminated according to its express provisions by the bankruptcy of the Lindy-Friedman Clothing Company, Inc. On the other hand, the trustee insists that the term 'lessee' as used in the lease must be strictly construed, and, so construed, must be held to refer to the original lessees, Lindy and Friedman, only. I think such construction too narrow, too technical, because it does not accord with the contemplation of the parties to the lease. It is not to be doubted that the organization of the corporation, now the bankrupt, was contemplated, for the lease itself shows such to be the fact; and I think it is not unfair or unreasonable to say that the intention of both the parties was that the corporation, when organized, should step into the shoes of the original lessees, Lindy and Friedman, and become as fully bound in every respect as Lindy and Friedman, were bound. It is not disputable that, if the assignment of the lease had been in the manner and form provided for in the lease, the corporation, the bankrupt, would have been entitled to all the rights and benefits conferred upon the 'lessee' named in the lease, and correspondingly would have been subject to all of the obligations imposed upon the 'lessee', Lindy and Friedman. Bearing in mind the purposes and objects sought to be accomplished by this provision in the lease, 'if a petition in bankruptcy be filed by or against the lessee,' etc., it seems clear to me that for all practical purposes the corporation would be considered the lessee—taking the place of Lindy

and Friedman under the contract with all the privileges granted, and together with the restrictions, reservations, and conditions stipulated in the lease instrument. While the lease was not formally assigned to the corporation, the trustee claims that the assignment was verbal, and that the original lessees simply admitted the corporation into possession of the leased premises, and that thereafter the corporation paid the monthly rental. If the lease is to be treated as having been formally assigned to the company, now the bankrupt, then, assuredly, the bankruptcy of the company operated as a forfeiture of the lease, and the landlords had the option to re-enter their premises because the contract in express terms provided that the bankruptcy of the lessee should work such forfeiture. The express provision is that—

'If a petition in bankruptcy be filed by or against the lessee in any Court of competent jurisdiction, the lessor shall have the right at his option to re-enter said premises and annul this lease.' "

Appellant seeks the shield and protection of the rule that conditions in a lease calling for a forfeiture are to be strictly construed against the lessor. That such a rule is applicable to certain kinds of conditions, appellee does not deny. But we do not concede that it is in any way applicable to the clause in the lease under consideration. This cause for forfeiture is not a harsh or oppressive one. On the

other hand it is a common, reasonable and just one, and accordingly calls for a reasonable and fair interpretation.

The case of Empress Theatre Company, appellant, vs. W. A. Horton, Trustee in Bankruptcy, appellee, 46 American Bankruptcy Reports, p. 80, is a case where the lease, among other things, contained the clause:

> "The bankruptcy or insolvency of the party of the second part, or other tenant who may go into possession of the premises, with the written consent of the party of the first part, shall at the option of the party of the first part, work immediate forfeit of the lease, and all interest of the party of the second part therein and thereunder."

There, as here, the trustee in bankruptcy desired to retain the lease and dispose of same for the benefit of the creditors. The District Court rendered its decision in favor of the trustee, and the appeal was taken by the lessor. The Circuit Court of the Eighth Circuit reversed the judgment of the District Court, and among other things said (p. 86):

> "Nor was there anything in the condition and covenants of this lease evil in itself or prohibited by law or contrary to the public policy of state or nation. The condition and covenants were not novel but common provisions in leases. Conditions and covenants in leases of the same

character have been repeatedly considered and generally, nay almost universally, sustained and enforced both by courts of equity and courts of law," citing Kann v. King, 204 U. S. 43, and numerous other cases.

Also, pp. 91-92:

"The record presents full, clear and strict proof of the right of the respondent, as a matter of law to the termination of the term of the lease and the lease itself, and to the return of the leased premises to it upon the service of its notice of election to enforce that right, and in such a case equity ought to and it does follow the law and enforce the right. The decree and orders below must, therefore, be reversed."

In the case of Lindeke v. Associates Realty Co., 146 Fed. 630, 1906 (C. C. A.) Minn., the question of the proper construction of similar forfeiture clauses in leases was considered as follows:

"The final contention of appellants' counsel is that the courts are adverse to forfeitures and that they are the abhorrence of courts of equity. Equity, however, still more abhors a failure of justice, as nature does a vacuum. In Brewster v. Lanyon Zinc Company (C. C. A.) 140 Fed. 801, 819, the conditions under which a court of equity will assist in the enforcement of a forfeiture under lease contracts, are extensively discussed by Judge Van Devanter. His conclu-

sion is aptly expressed in the following paragraph:

> 'The better rule is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underly it; and that in cases, otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief. As said by Story, Eq. Jur. par. 439: "The beautiful character and pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." ' "

In the case of Louis K. Ligget Co. v. Wilson, 113 N. E. (Mass.) 184, the propriety of a clause permitting of a forfeiture in the event of bankruptcy of the lessee is clearly set forth as follows:

> "Where a lessee becomes bankrupt (or otherwise unable to meet his obligations) unless some clause providing for the contingency is inserted in the lease the lessee continues to be the owner of the term created by the lease and all that the lessor can get is such dividend on the amount of the rent as the bankrupt lessee can pay. To protect the landlord against that contingency it is not uncommon to insert in leases a clause

providing (1) that the leasehold estate shall be conditioned upon the lessee not becoming bankrupt (or otherwise unable to pay his debts) and (2) that if the lessee does become bankrupt (or otherwise unable to pay his debts) the lessor may enter and end the leasehold estate for condition broken. If the contingency arises and the lessor does enter and end the leasehold estate, the loss to the lessor mentioned above is avoided."

And likewise in the case of Galbraith v. Wood, 144 N. W. (Minn.) 945, the court said:

"The default clause provides that the lessors may, at their election, declare the term ended and re-enter the premises. It gives but a single remedy. Of course, defendants were not obliged to terminate the lease, but they had the clear right to do so, and certainly were not bound to retain a bankrupt tenant, with the probability of non-payment of the rent, and a sale of the leasehold by the bankrupt estate."

## REPLY TO APPELLANT'S SECOND CONTENTION.

Was there a waiver of the forfeiture by the appellee? It is the appellee's (lessor's) position that there was no waiver. The correspondence between the trustee and the lessor (Transcript of Record, pp. 10-13) shows an unequivocal intention and de-

claration on the part of the appellee, as well as due and sufficient notice to the trustee, that the lease would be terminated when the lessees were adjudicated bankrupt.

> "I will consider the lease terminated at the time the court decides that Kimball and Webb to be bankrupt." (Transcript of Record p. 12).

It is idle for the trustee to now assert or urge that he has been, in any manner whatsoever, misled or prejudiced by any act or word or deed on the part of the lessor. Moreover, the trustee had no right or authority after receiving the said notice from the appellee that the lease was terminated, to insert upon the checks thereafter given in payment of the monthly rental the words, "under lease date of October 4th, 1919, $340.00." In fact, such act on the part of the trustee was not merely the violation of a right; on its face it would appear to be a deliberate and purposeful scheme on the part of the trustee to catch the appellee in a trap, and virtually to defraud him. In the transaction the trustee was an officer of the District Court. Surely the District Court of the United States does not expect its ministerial officers to resort to trick and device, nor does it approve or uphold an advantage sought to be obtained by such methods. The obliteration of those words on the back of the checks by the appellee was not a serious or important irregularity on his part in view of the fact that the checks were countersigned by

the Referee and that the appellee consulted that officer concerning same, and acted, if not by the advice or direction of the Referee at least with his assurance and approval. Moreover that act clearly evidenced the definite intention on the part of the appellee to no longer recognize the lease as having any further force or effect, and signified again that he, the said lessor, was merely accepting payment from the trustee of a monthly rental, independent of the lease, for the reasonable use and occupation of the premises during the period of time that was necessary in winding up the affairs of the bankrupts, and which compensation he had a right to receive.

The law recognizes the right of a landlord to receive compensation, independent of the lease, for the occupation of the premises under circumstances precisely similar to the instant case. In the case of Myers vs. Herskowitz, 33 Cal. App. R. 581, 584, this matter is discussed as follows:

> "The tenant having succeeded in retaining possession of the premises during the pendency of the action, plaintiff was entitled to compensation therefor, and after the benefit had been received by the defendant the plaintiff might reasonably accept such compensation, to which he was entitled, without being held to have waived the right of action which he was then prosecuting. In Ramish v. Workman, ante, p. 19, (164 Pac. 27), it was held that the landlord was entitled to recover rent for a period which

included the time between the entry of a judgment for possession and the date of actual ejectment of the tenant. 'So long as defendants continued to occupy the premises pending the final determination of the action for unlawful detainer, the lease constituted the measure of their liability for such time as they remained in possession.' Under these circumstances, we perceive no reason why plaintiff's acceptance of compensation to which he was clearly entitled should force upon him an implied waiver which he did not intend and which evidently the defendant knew that he did not intend. 'Neither will the receipt of rent after a landlord has actually commenced his action of ejectment for the forfeiture, or as compensation for the occupation, the landlord reserving the right to reenter, amount to a waiver.' (Taylor on Landlord and Tenant, 9th ed., sec. 497.)"

And in the case of In. re. Crawford Plummer Co., 253 Fed. 76, the Court said:

"A trustee or receiver has the right to use the premises occupied by the bankrupt for a reasonable period, sufficient to enable him to dispose of the bankrupt's property without unnecessary loss. * * This court has several times stopped landlords from prematurely ousting receivers or trustees. Such use of real estate is not an adoption of the lease to the bankrupt. The liquidating officers are to pay therefor reasonable compensation for the use and

> occupancy of the premises * * * It has generally been thought that the rent reserved in a lease to the banrupt was, under ordinary conditions, the fair measure of what the use and occupancy by receivers or trustees was fairly worth, * * *"

The appellee (lessor) concedes the law generally to be as stated in appellant's brief, to wit, that the receipt of rent accruing after the occurrence of causes of forfeiture bars the right of the lessor to enter for condition broken. These are, however, exceptions to the rule, which are as certain and well defined as the rule itself, among which it may be stated that there is no waiver if there is no intention to waive the forfeiture and the adverse party was not misled or prejudiced by the act of the lessor.

The essential elements of waiver are clearly set forth in the case of Myers vs. Herskowitz, 33 Cal. App. R. 581, 584, as follows:

> "* * * the question of waiver is one of intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. To establish such waiver the evidence must indicate a meeting of minds and the intentional forbearance to enforce a right. (Alden v. Mayfield, 164 Cal. 6, at p. 11, (27 Pac. 45). Where the general course of dealing between parties has led one of them to believe that a strict compliance with the terms of a condition binding him will not be required, the other party may be

estopped from claiming the forfeiture. What we have to determine, therefore, is whether the plaintiff manifested an intention to waive his objections to the conduct of the defendant, and whether in so doing he misled the defendant to his injury by causing defendant to believe these infractions of the covenant would be condoned."

In 40 Cyc. 261, the subject of waiver is discussed at length as follows:

"The quesion of waiver is mainly a question of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby. Since intent is an operation of the mind it should be proven and found as a fact, and is rarely to be inferred as a matter of law. An intention to make the waiver claimed should clearly be made to appear by the evidence; and the best evidence of intention is to be found in the language used by the parties. The true inquiry is what was said or written, and whether what was said indicated the alleged intention. The secret understanding or intent of the parties is immaterial on the question of waiver. The intention need not necessarily be proved by express declarations, but may be shown by the acts and conduct of the parties, from which an

intention to waive may be reasonably inferred, or even by non-action on their part."

In the case of Gary Realty Co. vs. Kelley, 214 S. W. (Mo.) 92, the court had under consideration a case somewhat similar to the case at bar. There, as here, the lessor would terminate the lease by reason of the bankruptcy of the lessees. The trustee continued to make the payments of the monthly rentals, and subsequently asserted that the lessor had thereby waived the right to forfeit the lease. In repudiating this argument the court said:

"Here, immediately after the occurrence of the fact constituting a breach of condition, notice of plaintiff's election to declare a forfeiture therefor was given. And plaintiff has throughout and up to now continuously insisted on this forfeiture. Thereafter, an agreement for a continuance in possession of the receiver of the lessee was made with the latter. But such continuation in possession was not to be under the terms of the lease now alleged to be forfeited, but was pursuant to a new arrangement entirely. No acquiescence in the breach ever at any time occurred on plaintiff's part. Nor is there in the record any acquiescence in receiver's alleged possession under the lease. The lease was throughout by plaintiff declared and deemed to be forfeited, abrogated, and at an end, and this condition of forfeiture was agreed to and acquiesced in by the lessee's receiver, who fully understood all the facts and the entire situation

> and who thereafter was treated as, and paid rent till given notice to quit, as a tenant by the month. No one ought to be deemed to waive a right when every act he does and every word he utters constitutes a denial of a waiver thereof, and a denial of any intention to waive it. Especially when this attitude is fully disclosed to, and known at all times by, the adverse party. We conclude that there was no waiver of the forfeiture disclosed by the facts in this case."

The case of Gulf C. and S. F. Ry. Co. vs. Settegast, 15 S. W. (Tex.) 228 relied upon by appellant is entirely distinguishable from the instant case. In that case, the lessors brought an action to cancel a lease which had been made by them with the Texas Western Railway Company, and which was thereafter assigned by the latter to the Gulf, Colorado and Santa Fe Railway Company. The lessors declared that this assignment forfeited the lease because written consent, as required by statute, had not been granted. The defendants (original lessees and assignees) set up waiver of the right of forfeiture because the lessors accepted rent from the assignee, Santa Fe Company. The court said (italics ours):

> "Having accepted money from the appellant, *which was due only in case the contract continued in force after the assignment*, they are estopped to deny the continued existence of the lease, and to say that they did not know the appellant in the transaction."

The quotation in appellant's brief from the case of Croft vs. Lumley, 119 Eng. Rep. 622, 634, would have been a more accurate statement of the law, had the remaining portion of the paragraph from which it was taken been inserted. That portion of the paragraph is as follows:

> "Mr. Martelli might have refused to receive the money offered as arrear of rent; and then the plaintiff might have proceeded for the forfeiture; but Mr. Barnes, who offered the money, *repeatedly told him* that, if the money was received, it was to be received and applied *in payment of the arrear of rent* due by the lease; and, under these circumstances, whatever words he might utter, when, acting by the authority of the plaintiff, he took up the money and carried it away, in point of law he received it as rent, thereby waiving the forfeiture and confirming the lease."

The appellant quotes from Jones v. Della Maria, 32 Cal. App. Dec. 554; 191 Pac. 943, but an examination of that case shows that the court recognizes the clear line of distinction which is overlooked by appellant. Thus in the decision (the italics being ours) we find the following:

> "Waiver is the *intentional* relinquishment of a known right or such conduct as *warrants an inference of the relinquishment* of such right—an *election* to forego some advantage he could have taken or insisted upon * * * * *

> Having elected to treat his tenant as no longer entitled to possession or to any right under the lease, the landlord's course must be consistent with this claim in the further progress of the proceedings that he has instituted. And if thereafter he accept rent accruing subsequently to the demand for possession or accruing subsequently to the commencement of the action, and accept it as rent *eo nomine* that is, *as payment under the original lease contract*— he affirms that the lease is still in existence, and thereby waives the forfeiture that he has elected to enforce.
>
> * * * A landlord who thus recognizes a lease as a *subsisting, operative contract* should not be permitted to insist upon a past forfeiture."

But in the instant case instead of there being an intentional relinquishment of the right to declare a forfeiture, there was the positive assertion that the lessee "will consider the lease terminated at the time the court decides Kimball and Webb to be bankrupt." Instead of conduct such as warrants an inference of the relinquishment of the right, we find that the appellee went to the Referee, one of the officers of the court, who was one of the signers of the check, and told him that he, appellee, intended to exercise his option under the lease to cancel it," and was by that officer led to believe that he would not forfeit his right by cashing the check; and at all times there-

after the appellee made clear and plain to the trustee that he, the appellee, did not relinquish or waive his right to consider the lease terminated; and instead of recognizing the lease *as a subsisting and operative contract*, he from the beginning acted and declared to the contrary.

The appellee therefore respectfully submits that the order of the District Court affirming the order of the Referee should by this Court be affirmed.

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